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CHESTER J. CULVER, GOVERNOR
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SUPERFUND DIVISION

DEPARTMENT OF NATURAL RESOURCES
RICHARD A. LEOPOLD, DIRECTOR

March 24, 2009

Ken Buchholz
Chief, Emergency Response &
Removal North Branch
Superfund Division
EPA Region VII
901 N. 5th Street
Kansas City, KS 66101

Pradip Dalal
Chief, Iowa/Nebraska Remedial
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Superfund Division
EPA Region VII
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40323046



Superfund

RE: Referral Request

Former Citizen's Gas & Electric MGP Site, Current Property Owner Aquila, Inc.
Located at 7th St. between 10th and 11th Ave., Council Bluffs, Iowa
EPA File No. IAD 984569093

Dear Sirs:

The purpose of this letter is to advise EPA of the regulatory status of the this former manufactured gas site (MGP) and request that EPA Region 7 consider taking the lead in attempting to negotiate a consent order amongst PRPs or take other appropriate action to address this contaminated MGP.

I am enclosing a select packet of documents to assist you in making some initial assessment of the regulatory status. The Department sent Glenn Curtis and Ken Buchholz a letter dated March 26, 2003 notifying EPA Region 7 that despite the fact this site had been assigned a NFRAP classification, there was current and planned development plans within this area and other data that may justify removing the NFRAP classification. The letter advised of the difficulty the Iowa DNR was having trying to negotiate a cost sharing agreement with the PRPs and suggested the possibility of EPA Region 7 taking over the lead.

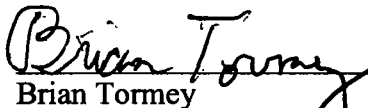
Mr. Buchholz responded by letter dated May 13, 2003 recognizing the need to require further assessment and advising DNR to make a formal referral request if necessary.

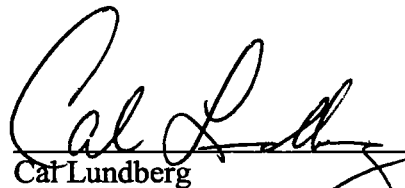
Therefore, please consider this letter a formal request that EPA Region 7 take the lead in regulating this MGP site. The City of Council Bluffs and the Pottawatomie County Development Corporation have an ambitious development plan for this area and have made several formal

requests to the DNR to initiate some action to address this site. DNR technical and legal staff are available to assist and make available our file information.

The project manager is Tami Rice, 515-281-4420, tami.rice@dnr.iowa.gov. DNR attorney David Wornson, 515-242-5817, david.wornson@dnr.iowa.gov, worked on the PRP negotiations.

Sincerely,


Brian Tormey
Land Quality Bureau Chief
515-281-8927

 3/23/07
Cal Lundberg
Contaminated Sites Section Supervisor
515-281-7040

cc. T. Rice, D. Wornson, DNR
Pottawatomie County Development Corporation, 7 North 6th St., PO Box 1565, Council
Bluffs, IA 51502

Att. DNR File Packet

Memorandum

From: Mick Leat, Iowa Department of Natural Resources
Date: October 7, 2003
Re: Council Bluffs MGP

The following is a listing of the data gaps remaining in the assessment of the site referred to as the Citizens Gas and Electric Company Manufactured Gas Plant, broken down into the 3 media of concern at the site: 1) contaminant sources, 2) groundwater, and 3) soils.

1. **SOURCE AREA.** The Department's position is that these materials will need to be removed from the site or otherwise treated independent of risk assessment determinations.

1. **Data Gaps.** Assessment will be needed to address these concerns.

- a) The following probable source areas were not investigated – 2 “oil tanks buried” shown on the eastern ½ of the site (adjacent to the RR tracks) and probable valve pit shown on the 1928 Sanborn map.
- b) No tar separators or tar wells/cisterns were shown on any of the Sanborn maps. Based upon my experience, these structures will vary in size, ranging from 10'-20' long and 5'-35' deep and could have been constructed of wood, concrete, or brick. These structures were a necessary component of every MGP site. Because of the size and length of operation of this plant, it would be expected that more than one of each of these had existed at the site and that they would be of the larger size.

2. **Identified Source/Product Areas.** These are the source areas identified by the Department. Assessment may identify other source areas.

- a) Gas Holder #2 (16.5' deep) contains extremely high concentrations of BTEX and PAHs, based upon the analytical results from SB-16 (230 mg/kg benzene, 3,000 mg/kg cPAHs and 44,000 mg/kg tPAHs).

- b) Gas Holder #3 (4.5' deep) contains extremely high concentrations of BTEX and PAHs, based upon the analytical results from SB-21 (160 mg/kg benzene, 970 mg/kg cPAHs and 16,000 mg/kg tPAHs).
- c) Gas Holder #4 (16.5' deep) contains extremely high concentrations of BTEX and PAHs (820 mg/kg benzene, 1,300 mg/kg cPAHs and 25,300 mg/kg tPAHs). High concentrations of BTEX and PAHs also exist outside of the holder from SB-27 (7' bgs).
- d) NAPL may exist at SB-15, based upon the analytical results from SB-1537 (730mg/kg cPAHs and 7,900 mg/kg tPAHs).
- e) It appears that free product exists in monitoring well MW-3 (ST-11). Free product/tar exists at ST-6, ST-7, ST-8, ST-12, ST-13. (This is from EPA's Jan. 24, 1992 letter to Peoples Natural Gas; Appendix B to the Phase II investigation report.) Free product has been shown to accumulate and possibly migrate away from MW-3 (Appendix M to the investigation report). Free phase oils were encountered at SB-20, which precluded the planned installation of a well at this location (April 20, 1994 letter from Barr Engineering to EPA; Appendix F to the Phase II investigation report). Figure 6-1 presents an area that exhibits a moderate to heavy sheen. This area seems to arbitrarily follow the approximate property boundaries of the MGP. The SB-15 and MW-6 areas should be included in this area, and this boundary unexplainably ends within 10 feet of the ST-7, ST-12, SB-19, SB-20, SB-28, and MW-5. Free product delineation is necessary.
- f) Based upon the Department's experience, underground piping associated with the MGP may contain tars and other MGP wastes. An assessment will need to be performed to locate piping and characterize piping contents.

2. GROUNDWATER.

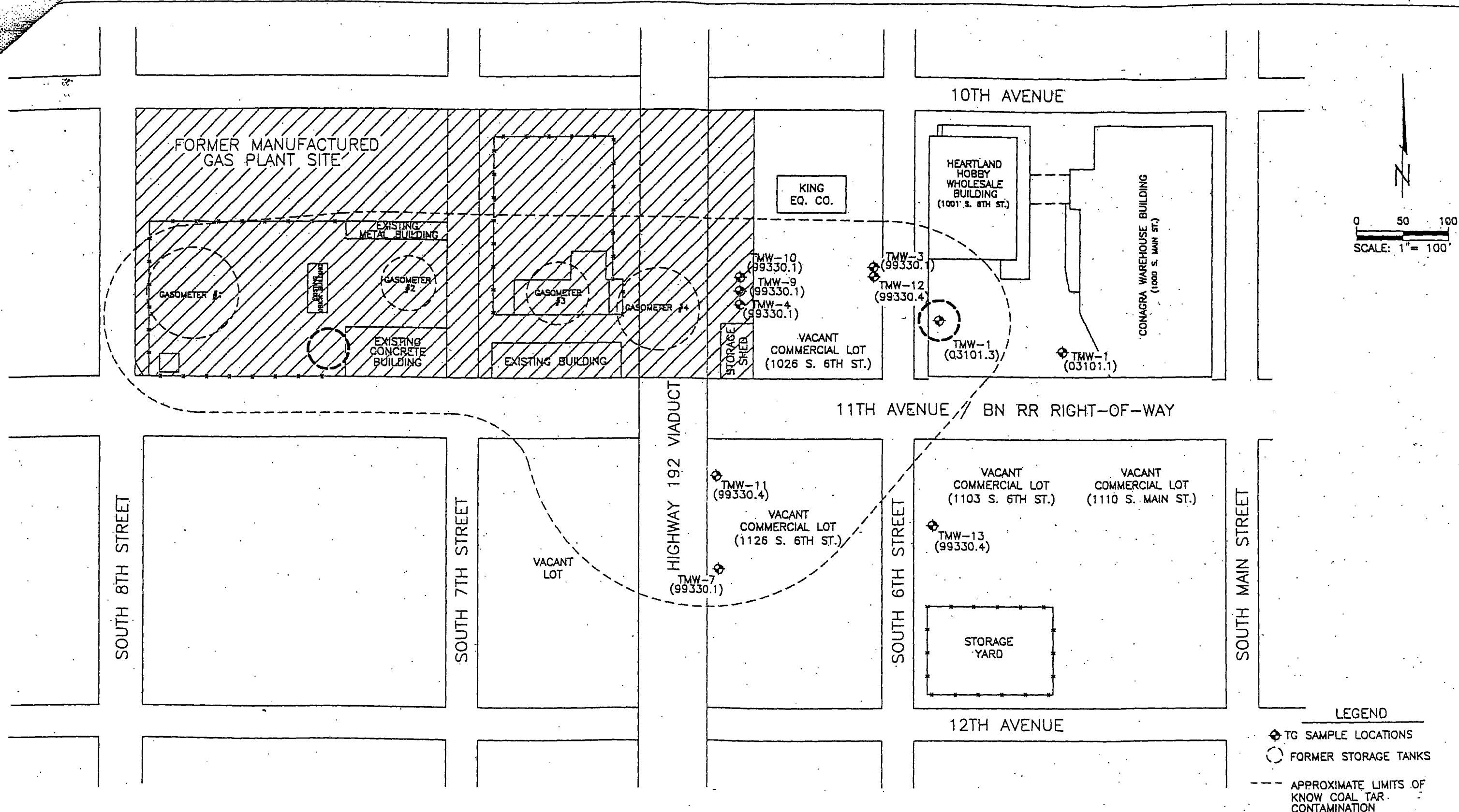
- 1) **Data Gaps.** The data gaps associated with groundwater characterization will need to be addressed through site assessment.
 - a) The groundwater flow direction has fluctuated in the past from due western to due southern flow; we need a better understanding of the site hydrogeology.

- b) Based upon deep soil analytical data from SB-15, high concentrations of groundwater contamination is located on the 7th Street ROW and north of the western parcel. The northern extent of this contamination is unknown.
- c) Based upon the elevations of the bedrock surface taken from borings SB-15, SB-23, F-7225, F-7233, F-7237, and F-7240, a depression appears to be present south of the Gas Holder #4, which may serve as an accumulation point for DNAPL. On page 28 it is stated that NAPL was encountered at the base of the coarse alluvial aquifer in SB-15 and on page 39 it is stated that NAPL "is expected to pool at the bedrock surface and may migrate down slope along the bedrock surface". The DNAPL pool detected in the SB-15 area needs to be delineated. The wells installed by Pottawattamie County show that it has migrated east past Gas Holder #4, which is in an upgradient position. SB-15 is located upgradient from all 4 gas holders so DNAPL has either migrated upgradient in this area or an alternate source of contamination is present.
- d) The downgradient extent of the contaminant plume in groundwater has only been partially defined by MW-8. Additional delineation is needed east and west of MW-8, downgradient of holders 1, 3, and 4.
- e) An upgradient well should be installed for the western portion of the MGP property, combined with at least one upgradient well screened near the bottom of the coarse alluvium, to characterize upgradient contaminant concentrations.
- f) Visible contamination was noted in borings installed by Thiele Geotech due east of the easternmost gas holder from about 30' bgs to the bottom of the alluvial aquifer at 101'. Groundwater contaminant levels ranged up to 6,160 ug/L naphthalene in TMW-4 (water table well) and NAPL was identified at TMW-1, located near the intersection of 6th Street and 11th Avenue.
- g) After site assessment is complete, risk assessment techniques will be applied to determine the appropriate response to the identified groundwater contamination.

3. SOIL

- 1) **Data Gaps.** The data gaps associated with groundwater characterization will need to be addressed through site assessment.

- a) Surface soil contamination in ROW borings on 7th Street exceed the Statewide Standards for benzo(a)pyrene (0.29 mg/kg): SB-15 (0.410 mg/kg), (SB-20 0.54 mg/kg). Aquila collected samples in ROW in 2002 that indicated similar and higher levels of BaP contamination. The extent of PAH and BTEX contamination in soils above statewide or background standards needs definition in the ROW and street itself.
- b) Off site surface soil contamination exists above statewide standards: SB-24 (14 mg/kg) on IDOT property (within area of Gas Holder #4), SB-23 (0.43 mg/kg BaP) south of the site. The extent of PAH contamination in soils above statewide or background standards needs definition, particularly in those areas where redevelopment is proposed.
- c) Surface soil contamination exceeding statewide standard exists on both the eastern and western properties, as evidenced by soil results from SB-18, SB-19, SB-21, SB-22, and SB-24. Offsite surface soil contamination may exist north of SB-19 as this boring was installed within 10 feet of the property boundary.
- d) Surface and subsurface soil samples need to be collected and quantified for all of the MGP chemicals of concern in the properties included in the Council Bluffs South Main Urban Renewal Area where MGP wastes have been identified.
- e) After site assessment is complete, risk assessment techniques will be utilized to determine the appropriate response to the identified soil contamination.



LEGEND

- TG SAMPLE LOCATIONS
- FORMER STORAGE TANKS
- APPROXIMATE LIMITS OF KNOWN COAL TAR CONTAMINATION
- AREA IN WHICH NAPL HAS BEEN IDENTIFIED

TG THIELE GEOTECH, INC.

PROJECT
 COMMERCIAL PROPERTIES
 11TH AVE. & S. 6TH STREET



MidAmerican Energy Company
666 Grand Avenue, 8th Floor
P.O. Box 657
Des Moines, Iowa 50303-0657
(515) 281-2779 Telephone
(515) 242-4398 Fax
E-mail: maroy@midamerican.com

MARGARET A. ROY, Senior Attorney

December 11, 2003

David Wornson
Attorney, Iowa Department of Natural Resources
502 E. 9th St.
Des Moines, IA 50319

RE: Former Manufactured Gas Plant, Council Bluffs, Iowa

Dear Mr. Wornson:

This responds to your letter to Steve Guyer, dated October 16, 2003, in which you ask MidAmerican Energy Company ("MidAmerican") to assess its liability regarding the former manufactured gas plant ("MGP") site in Council Bluffs, Iowa, ("Site") and to provide copies of relevant records.

As I understand the argument advanced by the potentially responsible party(ies), MidAmerican allegedly is successor to any liability that Nebraska Power Company ("NPC") may have had for Iowa based MGP environmental liabilities.¹ For the reasons stated below, MidAmerican is not a potentially responsible party at the Site. I have attached the more significant supporting documents.

NPC's Liability Has Not Been Established

Assuming the factual information presented by the potentially responsible party(ies) is correct, during the period 1917-1928, NPC was the parent of the owner/operator Citizens Gas and Electric Company of Council Bluffs ("CGE"). CGE sold the Site real estate in 1928 to Council Bluffs Gas Company, then allegedly merged into NPC in 1937. No information has been presented regarding the operating relationship between NPC and CGE, and the alleged merger between the two.

Owner and operator liability arguably passed from CGE to Council Bluffs Gas Company in 1928. The asset purchase agreement appears to transfer every aspect of the MGP business to Council Bluffs Gas Company.² Thus, successors to Council Bluffs Gas Company may be responsible for pre-1928 owner/operator liability under the "substantial continuation" test. Under this test, courts look to the substance, not the form of the transaction to find successor liability. See United States v. Mexico Feed and Seed Company, 980 F.2d 478, 488 (8th Cir. 1992). Certainly the equities weigh in favor of assigning liability to the purchaser and then

¹ I have not attempted to verify the historical information the potentially responsible entities have provided regarding events occurring prior to 1946.

² June 1, 1928 Agreement between Citizens Gas & Electric Company of Council Bluffs and Council Bluffs Gas Company. (Attachment 1)

David Womson
Attorney, Iowa Department of Natural Resources
December 11, 2003
Page 2

operator of the MGP business and real estate, as opposed to the innocent purchaser of an electric distribution business 18 years after the fact.

Even assuming that CGE retained its owner and operator liability after selling the MGP, NPC may not have succeeded to the liabilities of CGE. Although the parties are reported to have merged, no merger agreement has been presented. Further, there is no information to support a theory of derivative owner and operator liability against NPC. Such a theory would require piercing NPC's corporate veil. A number of factors must be applied in order to determine whether a corporate veil may be pierced, but generally it is possible where the subsidiary was formed to perpetuate fraud, or where there was a failure to observe corporate formalities and separateness. No information has been presented that would indicate either circumstance existed here. Similarly, no information has been presented that would show NPC so controlled the MGP operations that it was directly liable as an operator.

Western Iowa Power Did Not Assume Environmental Liabilities

NPC later was purchased by the Omaha Electric Committee, ("OEC"), a non-profit quasi-public membership corporation without capital stock.³ OEC held assets in trust for the benefit of Omaha Public Power District ("OPPD").⁴ On November 14, 1946, OEC formed Western Iowa Power Company ("WIP") and owned all the shares.⁵ On December 2, 1946, WIP offered to purchase 77,000 shares of NPC stock from OEC.⁶ At that time, it appears that NPC owned and operated electric power facilities only. Upon receipt of the shares, WIP would issue bonds to NPC in the principal amount of \$3,350,000.⁷

That same day, OEC and twelve individuals, owners of all the issued stock of NPC, approved a plan of partial liquidation of NPC whereby WIP would surrender the 77,000 shares of NPC stock, and receive in return certain Iowa assets of NPC.⁸ The Plan of Liquidation approved by the NPC shareholders states that WIP will receive most Iowa electric distribution facilities, and:

other assets connected with the operation of the properties to be acquired by Western Iowa Power Company, consisting of cash, accounts receivable, inventories, prepaid expenses and other current assets, less certain liabilities,

³ Iowa Power and Light Company form U-1 section I(6), p. 1, January 29, 1949.

⁴ WIP directors meeting minutes, July 14, 1948, p. 1; WIP directors meeting minutes, August 18, 1947, p. 2.

⁵ WIP directors meeting minutes, November 19, 1946 p. 1.

⁶ WIP directors meeting minutes, December 2, 1946, p. 1-2. (Attachment 2)

⁷ *Id.* at p. 2. (Attachment 2)

⁸ *Id.* at p. 3. (Attachment 2)

which shall be assumed by Western Iowa Power Company, consisting of accounts payable, accrued taxes, customers' advances, customers' contributions, customers' deposits and accrued interest thereon, other current liabilities, and reserve for injuries and damages, the excess of such assets over such liabilities to equal the net aggregate amount of \$35,000, all as selected and determined by Haskins & Sells and R.W. Beck and Associates.⁹

For the reasons stated above, there is no evidence that NPC held environmental liabilities for the Site. Even assuming it did, there is no indication that the parties intended WIP to assume any specific liabilities, much less Iowa-based MGP environmental liabilities, when purchasing a small minority position in NPC stock for its electric distribution system. Even assuming the liabilities automatically accompanied the NPC stock, WIP held that stock for less than 24 hours before transferring it back to NPC. Even assuming a general rule that liabilities remain when the stock does not, under NPC's Plan of Partial Liquidation, WIP specifically retained only certain listed liabilities, Iowa-based environmental liabilities not being among them.

Iowa Power and Light Company Did Not Assume Environmental Liabilities

On February 11, 1949, Iowa Power and Light Company ("IPL") entered into an agreement with OEC to purchase all the outstanding shares of WIP from OEC for \$3,350,000 for its electric distribution system¹⁰. OEC warranted that the WIP financial statements correctly reflected WIP's financial condition; the financials do not show any recorded liability for Iowa-based MGP environmental liabilities.¹¹

On May 14, 1949, the transaction closed.¹² Later that day, IPL dissolved WIP.¹³ Under the plan of liquidation, WIP transferred all its assets to IPL, and IPL surrendered all of WIP stock to the WIP secretary for cancellation.¹⁴ IPL agreed to "assume all obligations of Western Iowa under all executory contracts, unexpired leases, and other undertakings of Western Iowa."¹⁵ WIP was authorized to wind up its affairs post dissolution.¹⁶

⁹ *Id.* at p. 4. (Attachment 2)

¹⁰ Agreement between Omaha Electric Committee, Inc. (for itself and as trustee for Omaha Public Power District) and Iowa Power and Light Company, February 11, 1949, p. 2-3. (Attachment 3)

¹¹ *Id.* at section 6(e), p. 6, and Exhibit A. (Attachment 3)

¹² OPPD Board of Directors resolution, dated May 14, 1949. (Attachment 4)

¹³ WIP Special Directors Meeting Minutes, May 14, 1949. p. 9. (Attachment 5)

¹⁴ *Id.* at p. 4-5. (Attachment 5)

¹⁵ *Id.* at p. 5. (Attachment 5)

¹⁶ *Id.* at p. 5. (Attachment 5)

David Wornson
Attorney, Iowa Department of Natural Resources
December 11, 2003
Page 4

As discussed above, WIP did not hold Iowa-based MGP environmental liabilities. Even assuming that it did, OEC did not pass those liabilities to IPL when it sold WIP stock to IPL. The parties relied on financial statements that did not show environmental liabilities. Further, the dissolution was implemented within seven hours of the acquisition of WIP stock. The plan of dissolution did not pass Iowa-based MGP environmental liabilities to IPL.

In summary, there is no evidence that NPC held environmental Site liabilities, and even if did, WIP did not assume liability for the Site. Assuming somehow that NPC held such liabilities, and further assuming that WIP obtained those liabilities, liability did not pass to IPL and then to MidAmerican. WIP and IPL purchased an electric distribution system without any knowledge of, or intent to evade MGP liabilities. There is no equity in requiring MidAmerican to address contamination caused by the MGP.

Due to the focused nature of your inquiry, I have not listed or addressed other defenses that MidAmerican may have, based on Blue Chip or other law, nor have I attempted to find potentially responsible parties.

Please call me if you have any questions.

Sincerely,

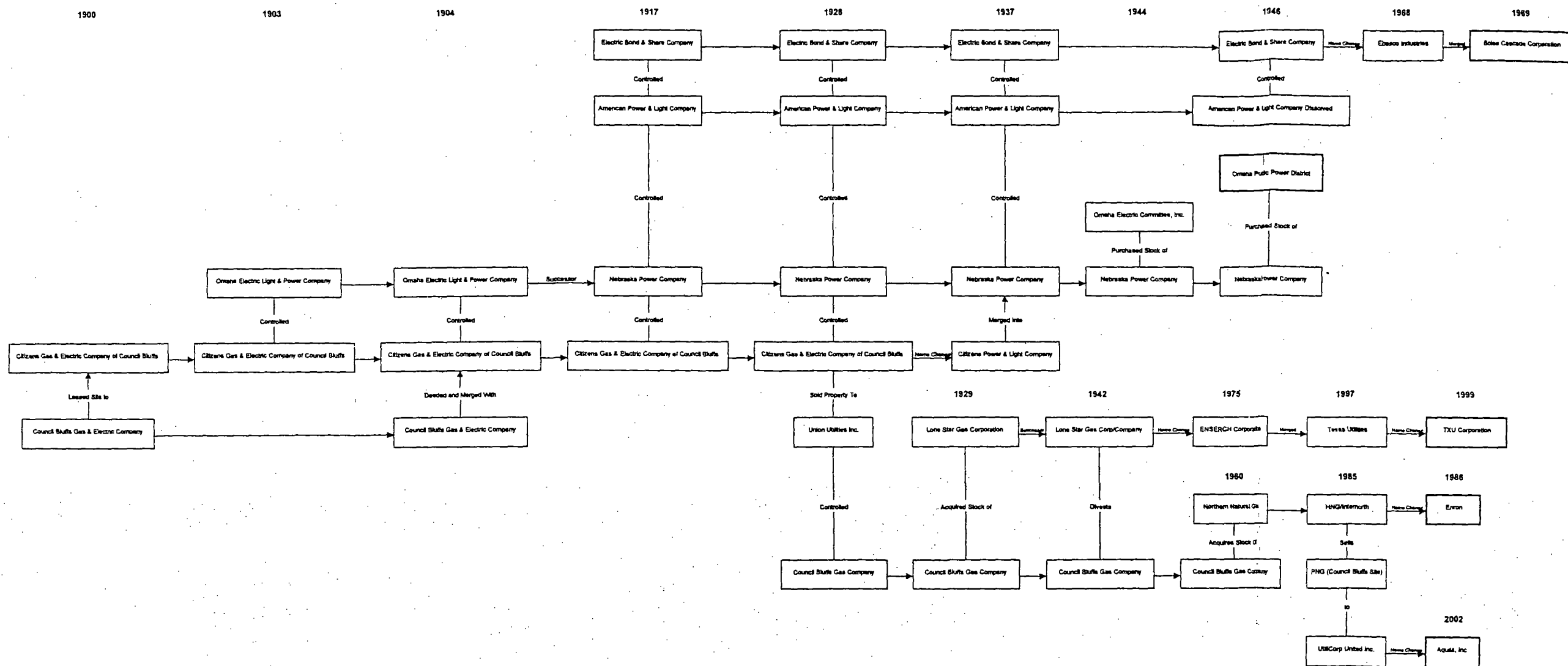


Peg Roy
Senior Attorney

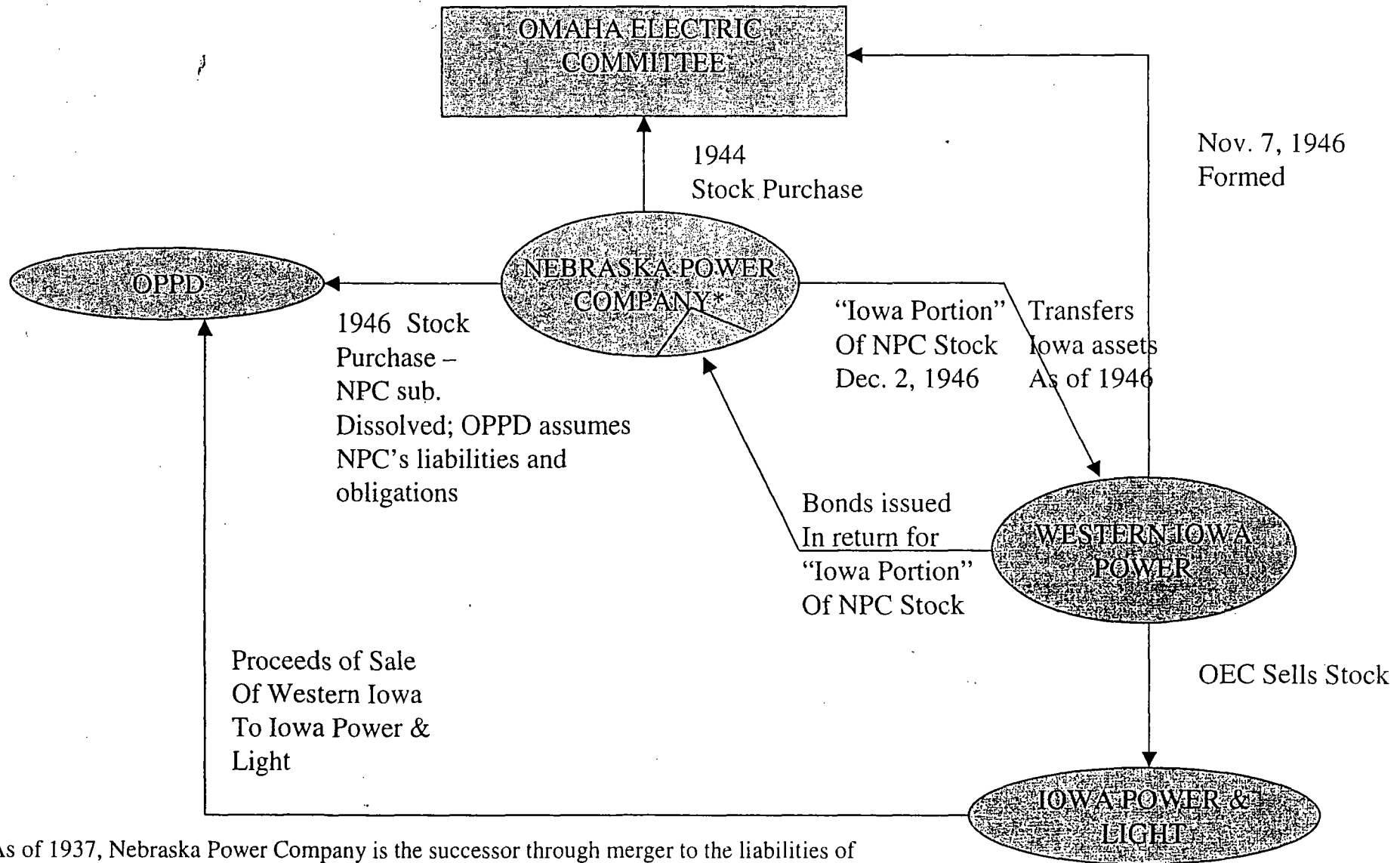
Enclosures

MAR/dsb

Council Bluffs MGP Ownership History



OPPD



* As of 1937, Nebraska Power Company is the successor through merger to the liabilities of Citizens Gas & Electric Company and Council Bluffs Gas & Electric Company, direct operators of Council Bluffs MGP from 1899-1928.



STATE OF IOWA

THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
JEFFREY R. VONK, DIRECTOR

October 16, 2003

MidAmerican Energy Corporation
Attn. Steven Geyer
666 Grand Avenue
Des Moines, IA 50309

RE: Potential Responsibility Party Investigation
Former Manufactured Gas Plant, 7th Street between 10th and 11th Ave., Council Bluffs, IA

Dear Mr. Geyer:

This letter is to inform MidAmerican Energy Corporation (MEC) that the Department is conducting an investigation into the history of ownership and operation of a former manufactured gas plant (MGP) site in Council Bluffs located on 7th Street between 10th and 11th Ave. This letter requests that MEC respond to some factual and legal issues regarding the potential affiliation MEC may have to former owners and operators of this site. The Department is also requesting other records or information MEC may have to assist the Department in clarifying the ownership and operational history. I am attaching some site maps and a staff memo describing prior assessment which has been done and some discussion of what further remedial action the Department believes needs to be done.

The Department recently met with attorneys representing several potentially responsible parties (PRPs): TXU, Inc.; Omaha Public Power District (OPPD), Iowa Department of Transportation (IDOT) and Aquila, Inc. In discussing the factual and legal basis for OPPD's potential liability, its attorney, Stephen Bruckner, suggested there may be some basis to implicate MEC as a successor to Iowa Power & Light Company. The parties agreed MEC should be notified of the research and facts available to date and given the opportunity to respond.

I will attempt to briefly summarize the facts and legal analysis that has raised some questions as to MEC's potential liability. Aquila, Inc., formerly Utilicorp United, Inc., acquired most of the property associated with this MGP in 1986 and continues to own it. Aquila acquired the property through what its attorney characterizes as an asset purchase from Peoples Natural Gas, a division of HNG/Internorth (which later became Enron). At this point Aquila's liability derives from its status as a current property owner under both CERCLA and state law.

Information to date generally indicates that a manufactured gas plant at this location operated from about 1899 to about 1932. There is also information from Council Bluffs news accounts that indicate the facility may have manufactured and stored gas up until the early 1950s on a standby basis to meet peak demand.

Jane Schilmoeller, attorney for Aquila, Inc., conducted research into the ownership and operation of the MGP and discovered a rather complex history of subsequent corporate affiliations with

owners and operators. She submitted the results of her research in a letter dated July 15, 2002 along with supporting documentation, which consists mostly of secondary sources such as Moody's. I am attaching the July 15, 2002 letter and a follow-up letter dated February 25, 2003. I am also attaching two flow charts Ms. Schilmoeller recently prepared which are helpful in tracking the corporate affiliations associated with the former owners and operators.

The Department notified two corporations, TXU, Inc. and Omaha Public Power District (OPPD) that they may be considered potentially responsible parties based on their arguable successorship to former owners and operators. (letter enclosed) The Iowa Department of Transportation has also been notified of potential responsibility since it acquired a small portion of the site in the 1970s as an easement to build an overhead highway. TXU, Inc.'s successorship derives from its affiliation with Lone Star Gas Company which acquired the stock of Council Bluffs Gas Company. Council Bluffs Gas Company owned the MGP from 1928 until 1960. As stated earlier, it appears the facility mainly operated as a MGP until about 1932. TXU, Inc. represented by attorney Richard Adams, stated it is prepared to participate in allocation negotiations.

Aquila's research presented facts to show that a company called Nebraska Power Company may be a successor to Citizen's Gas & Electric Company of Council Bluffs (Citizen's Gas) through a series of parent/subsidiary and merger relationships. Assuming this is accurate and assuming the law might place liability on Nebraska Power Company, the issue then becomes whether OPPD may have some liability as a successor to Nebraska Power Company.

Attorney Bruckner submitted a letter dated May 15, 2003 with supporting documentation which I am attaching for your reference. Mr. Bruckner's letter speaks for itself, but I would like to attempt to summarize the argument. He argues that (1) there is an insufficient factual and legal basis to find that Nebraska Power Company has any derivative liability from former owners and operators; and (2) assuming there is, OPPD is not a successor to any of the liabilities associated with any former Iowa properties previously held by Nebraska Power Company or its predecessors.

Mr. Bruckner's research convinces him that a Nebraska statute authorizing the creation of OPPD as a public utility also prohibited it from owning any out of state assets and associated liabilities. (we have not yet researched the statutory language and intent or any caselaw interpreting it) A mechanism was established in order to effectuate OPPD's acquisition of Nebraska Power Company without acquiring any out of state property and assets. Mr. Bruckner's letter describes a mechanism in which Nebraska Power Company stock was transferred to what has been referred to as an "organizing company", Omaha Electric Committee, Inc., a Nebraska non-profit corporation. A process was then undertaken to essentially value the real property and "certain other assets and cash" associated with then existing Iowa properties and assign a proportion of Nebraska Power Company stock to that valuation. The result is that OPPD acquired about 93% of Nebraska Power Company stock from Omaha Electric Committee, Inc. Omaha Electric Committee then transferred the remaining 7% of Nebraska Power Company stock to an Iowa company it created and for which it held all issued stock, Western Iowa Power Company. Western Iowa Power Company stock was then sold to Iowa Power & Light Company in 1949.

Iowa Power & Light Company through a series of mergers became part of MEC. OPPD argues it could not have acquired any liabilities associated with the Iowa MGP and which were held by

MidAmerican Energy Corporation
October 16, 2003

Nebraska Power Company since it did not acquire any stock of Nebraska Power Company anyway connected with Iowa properties and "assets". This conclusion is the point of contention.

One essential point that it not emphasized in Mr. Bruckner's May 15, 2003 letter is that at the time of the spin off in 1946-49, Nebraska Power Company did not own the MGP property nor has Nebraska Power Company ever owned the Iowa MGP property. Mr. Bruckner argues this is immaterial since the stock transfer to OPPD must be interpreted broadly to have removed any ownership interest with Iowa properties including liabilities of predecessor companies who did own and operate the Iowa MGP. Aquila argues that it appears the stock valuation and spin off was only intended to value existing properties and certain other assets in Iowa at the time of the transfer; and in fact, OPPD acquired 93% stock ownership of Nebraska Power Company which may be sufficient for them to succeed to derivative liabilities wherever they may have originated.


Aquila makes the point that these potential liabilities did not just disappear when Nebraska Power Company was acquired which raises the issue of whether the Iowa Power & Light Company acquired those liabilities when it acquired 7% of Nebraska Power Company stock which in some sense represented the value of then existing Iowa properties and "assets" held by Nebraska Power Company.

Obviously, more factual and legal research needs to be done to better understand the potential for liability, including review of the transactional documents and the language and intent of the Nebraska statute. However, all parties are very interested in getting MEC's view of its own potential liability and its interpretation of the facts and law surrounding OPPD's potential liability. It is expected that MEC may have records that shed more light on the Nebraska Power Company/ OPPD/Iowa Power & Light transaction.

I encourage MEC to communicate with Jane Schilmoeller and Stephen Bruckner. The Department would request MEC provide its response by November 21, 2003. All parties anticipate having a meeting to discuss further this issue and the possibilities of reaching some kind of allocation agreement.

I will be out of the office until October 30, 2003 but Mick Leat, 281-8045, should be available to provide access to Department records. Thank you for your cooperation.

Sincerely,



David L. Wornson

Attorney, Iowa Department of Natural Resources

Tel. 515-242-5817, Fax 515-281-8895, Email: david.wornson@dnr.state.ia.us

Copy: M. Leat, DNR

Jane Schilmoeller, Shook, Hardy & Bacon, LLP, 84 Corporate Woods, 10801 Mastin, Suite 1000, Overland Park, Kansas 66210-1671 (without attachments)
Stephen Bruckner, Fraser, Stryker, Meusey, Olson, Boyer & Bloch, PC, 500 Energy Plaza, 409 South 17th St., Omaha, NE 68102-2663 (without attachments)

MidAmerican Energy Corporation
October 16, 2003

David Ferree, Asst. Attorney General, IDOT, 800 Lincoln Way, Ames, IA 50010
(without attachments)

Richard Adams, Huntoon & Williams, 1601 Bryan St., 30th Floor, Dallas, TX
75201(without attachments)

Enclosures:

Memorandum

To: CON 12-15 Council Bluffs Coal Gas file
From: Mick Leat
Date: 10/10/03
Re: October 8, 2003 meeting minutes

Introductions

Wornson Going to discuss assessment and remediation needed and hope to come to an agreement on the next phase of activity. A risk assessment will be needed to scope final remedial actions. Department's position is that Aquila has some liability on this site as owner of properties that house the MGP.

Adams Asked when MGP operations began and Wornson's and Schilmoeller response was 1870's according to records.

Wornson Discussed different approaches to dealing with the site- LRP, AO, CO following either CERCLA or state rules. Asked for clarification from Aquila on current MGP property ownership.

Schilmoeller/Clement -Looking at the 62' Sanborn in handout, all of Block 12 south of the northernmost RR shown on map (lots 3-7 and 11-14), is owned by Aquila and leased to KC Peterson Construction. In Block 11, same RR is the northern boundary and all of the block S of that is currently owned by Aquila except lot 11 and the 192 ROW owned by IDOT. Lot 11 is referred to as the Meyer or Fishler property. MGP structures are located on Aquila property, Meyer property, and IDOT property.

Buchanan Handed out plat maps, depicting property ownership.

Wornson Introduced Leat in discussion about site assessment needs and potential remedial actions.

Leat Went through handouts with discussion. Started with source materials identified at the site by Department and additional likely sources as yet unidentified and stated that the Department's position was that source materials would be required to be removed from the site, regardless of program entered, if technically feasible. For instance, it may be infeasible to removed the contents of gas holder #4 because of highway construction issues and #3 may also be due to the buildings constructed over them. Discussed groundwater and data gaps. Some discussion followed.

Boyle Asked about groundwater gradients on site. Leat referred her to the figure in the handout depicting flow directions.

Leat Noted that contamination recently encountered by Pottawattamie County Development Corp. was hydraulically upgradient from MGP, based upon this map. However, because DNAPL

typically flows with gravity and not necessarily with gw gradient, it is likely that the detected contamination is from the MGP. Additional information will be needed to confirm this or identify another source.

- Anderson Noted that the purpose of the Phase II investigation was to determine if contamination was present on the properties assessed; the purpose of this investigation was not to delineate MGP contamination.
- Buchanan Described Development Corporation's South Main Urban Renewal Area and handed out maps showing it.
- Gross Explained that City recently purchased property west of 192, but the City has no plans for redevelopment of the properties west of 192 near the MGP property but added that something was needed in that area to revitalize it. Around 14th, 15th, and 16th Avenues on west side of 192, the city is in the process of developing over 100 single family homes; this is south of MGP a couple blocks. In response to an inquiry of Brownfield grant application, they have applied for an EPA grant twice and were not awarded one.
- Clement Asked if the Department would consider nonresidential cleanup standards for the proposed residential area east of the MGP. Leat replied that cleanup will be tied into actual land use and the presence of deep contamination on some property should not necessarily preclude residential development. Gross confirmed that the plans shown on the handout are conceptual and subject to change.
- Jankowski Stated that as soon as the City can complete the sewer work on 6th and 7th Streets, they will have completed storm sewer/sanitary sewer separations required by law.
- Wornson DNR wants assessment to move forward and will be looking to Aquila to assess their properties and for IDOT to assess their site.
- LaBarge Aquila's viewpoint is that accepting responsibility will be a defacto acceptance to do all additional work and is looking at other PRPs to help fund needed work.
- Bruckner OPPD's position is that they have not connection to site ownership or plant operation and therefore has no successor liabilities.
- Adams TXU's perspective is that they will accept responsibilities in line with the relatively limited time when their successor company operated the plant. They will consider some financial participation but need to know more about the site.
- Schilmoeller Aquila's position is contrary to OPPD's and at issue is the largest chunk of liability due to operator liabilities.
- Bruckner Mentioned that Western Iowa Power Company sold assets to Iowa Power in 1946 and that someone reported that the plant operated for peaking purposes until 1950.
- Schilmoeller Mentioned that their may be other sources of the contamination noted east of 192 by the County Development Corporation.

Break

October 10, 2003

Discussion followed with respect to OPPD's potential liability as a successor company to Citizens Gas and Electric Company and Nebraska Power Company. OPPD rep stated that CGE closed the plant in 1932 and CGE merged with NPC in 1937. He stated that Blue Chip requires that in order to demonstrate liability, it will need to be able to document that a release occurred prior to 1937. In 1946 NPC liquidated its interest in Iowa properties by stock sale to Western Iowa Power (WIP), which eventually became Iowa Power and Light as a result of a Nebraska law that created the state power authority.

Aquila's understanding that it was a merger between OPPD and NPC, and OPPD's position was that records do not show that it was a merger. Aquila believes that parent-subsidary derived liability may exist between CGE/NPC/OPPD and that liabilities may have also been passed by the asset transfer of CGE to Council Bluffs Gas Company. OPPD indicated that transactional documents would clarify the nature of these transactions.

OPPD stated that the NPC to WIP was a stock transfer and liabilities and assets go along with this stock transfer. Therefore, OPPD's position is that owner liabilities pass along to the successor of Iowa Power and Light, which is MidAmerican Energy Company.

TXU restated that they recognize some liabilities are prepared to pay their equitable portion for assessment and cleanup.

IDOT stated that they recognize some responsibility as a site owner but do not have enough information to determine degree of contribution.

It was decided that MEC needs to be involved in these negotiations as a PRP. It was decided that Dave Womson would draft a letter to MEC asking for their responses to the reported claims.

typically flows with gravity and not necessarily with gw gradient, it is likely that the detected contamination is from the MGP. Additional information will be needed to confirm this or identify another source.

- Anderson Noted that the purpose of the Phase II investigation was to determine if contamination was present on the properties assessed; the purpose of this investigation was not to delineate MGP contamination.
- Buchanan Described Development Corporation's South Main Urban Renewal Area and handed out maps showing it.
- Gross Explained that City recently purchased property west of 192, but the City has no plans for redevelopment of the properties west of 192 near the MGP property but added that something was needed in that area to revitalize it. Around 14th, 15th, and 16th Avenues on west side of 192, the city is in the process of developing over 100 single family homes; this is south of MGP a couple blocks. In response to an inquiry of Brownfield grant application, they have applied for an EPA grant twice and were not awarded one.
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Break

FRASER STRYKER MEUSEY OLSON BOYER & BLOCH, PC
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DENVER

October 1, 2003

Sent Via Fax 515-281-8895
and U.S. MailMr. David L. Wornson
Iowa Department of Natural Resources
Wallace State Office Building
Des Moines, IA 50319RE: Former Manufactured Gas Plant ("MGP") Site at 7th Street between 10th and 11th Avenue,
Council Bluffs, Iowa ("Council Bluffs MGP Site")

Dear Mr. Wornson:

I have received your letter of September 15, 2003, inviting representatives of Omaha Public Power District ("OPPD") to attend a meeting in Des Moines on October 8, 2003 concerning the above-referenced site. I have been authorized to represent OPPD at this meeting. OPPD believes my letter of May 15, 2003 establishes clearly that OPPD has no legal connection to or liability for any alleged contamination at the Council Bluffs MGP Site. Accordingly, while OPPD has directed me to attend the October 8th meeting, OPPD continues to request that the Department acknowledge, in writing, that OPPD is not a potentially liable party with respect to the Council Bluffs MGP Site.

Very truly yours,


Stephen M. Bruckner
FOR THE FIRM

SMB/sac

cc: Jane Schilmoeller, counsel for Aquila
Richard Adams, counsel for Texas Utilities
Mary Kay Solberg, Iowa Department of Transportation
Matt Buchanan, Pottawattamie County Development
Ed Jankowski, City of Council Bluffs

333897



STATE OF IOWA

THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
JEFFREY R. VONK, DIRECTOR

August 5, 2003

Shook, Hardy & Bacon, LLC
Attn. Jane Schilmoeller
84 Corporate Woods
10801 Mastin, Suite 1000
Overland Park, Kansas 66210-1671o

RE: Former Manufactured Gas Plant Site (MGP)
7th Street between 10th and 11th Ave., Council Bluffs, Iowa

Dear Ms. Schilmoeller:

The Department has reviewed available information regarding the ownership and operational history of this former MGP, including the research you have provided on behalf of Aquila, Inc. I have also received a written response to my letter dated March 31, 2003 from counsel representing Omaha Public Power District (OPPD). A copy of my letter and the response is enclosed for your reference. I received a response to my letter dated March 31, 2003 from counsel for TXU, Inc. a copies of which are enclosed. I have also received some additional information regarding the history of Council Bluffs Gas Company through the Delaware Secretary of State records, which I am enclosing for your reference.

The Department has had some contacts with the Iowa Department of Transportation, and we intend to follow up with them regarding potential responsibility arising out of their drilling activities, which appear to have struck an old gasholder. I have also had some difficulty reconciling property ownership of the lots within Block 12 which is the block on which the K.C. Peterson Construction Company has buildings. For example, the information you sent me off an abstract shows lots 3, 8 and 11 of block 12 being acquired by K.C. Peterson from Utilicorp in 1986. However, the Pottawatomie County Assessor and Auditor's database shows the whole parcel being owned by Peoples Natural Gas. The best information I could get from the county assessor and auditor as to ownership of lots in Block 11 shows Linda Whisler as the owner of a southwest corner lot. Northern Natural Gas appears to own the rest of Block 11. The assessor and auditors office could not find the warranty deeds transferring ownership from Internorth to Utilicorp in 1986. Can you help me get the ownership on Block 11 and 12 clarified?

The Department has consulted with EPA Region 7. Region 7 has reviewed the matter and agreed that further site assessment needs to be conducted at this site, which will likely include parts of Block 11 and Block 12 where the former gas plant structures have been identified. This is especially true in light of the proposed development in this area. It is my understanding EPA has been briefed by representatives of Council Bluffs regarding potential future plans for this area.

Without getting into a lot of detail regarding liability analysis, the Department has decided that Aquila, Inc. should take the lead in initiating further site assessment of the property they own and depending on the results of the assessment adjoining properties. The factual and legal issues surrounding liability of

"successor corporations" is too ambiguous at this time and we believe assessment work needs to begin. We intend to continue to research other potentially responsible parties and particularly, we will be discussing further assessment by the Iowa DOT in the area they acquired for bridging and where they apparently drilled through a gasholder.

The Department is relying on both State of Iowa law as discussed in *Blue Chip Enterprises et al v. IDNR*, 528 NW2nd 619 (Iowa 1995) (*Blue Chip*) as well as CERCLA in placing liability on Aquila in its capacity as a current property owner.

Oversight of this project was deferred to the IDNR from EPA Region 7. Region 7 is prepared to take back oversight of the project and enforce federal law if the IDNR is not able to achieve environmental objectives under state law. It is well settled under CERCLA that a current owner of a facility can have responsibility for remedial action regardless of whether they caused the release of hazardous substances.

TXU, Inc. has indicated they may be willing to negotiate some kind of cost sharing based on their still uncertain affiliation with Lone Star Gas Company and its affiliation with Council Bluffs Gas Company. Omaha Public Power District (OPPD) appears to take a rather firm position they have no environmental liability based on current facts. The DNR has decided that any issues of contribution should be pursued amongst these parties rather than trying to negotiate a cost sharing agreement to commence assessment activities. We intend to actively be involved in attempting identify responsible parties should any cleanup action be required.

Depending on Aquila's response to this position, the Department may suggest entering into a consent order, enrolling the site into the Iowa Land Recycling Program, continuing on a voluntary basis without an order or issuance of a unilateral order. We may also consider referral back to EPA Region 7. The Department is however anxious that assessment work commence at the site.

The Department would like to set up a meeting with Aquila in the next few weeks to discuss the scope of assessment and a plan for how to proceed at this point. We may also want to bring in the IDOT. The project manager will be Mick Leat who can be reached at 515-281-8045 and as usual feel free to contact me for further discussion.

I would appreciate it if you could respond to discuss Aquila's intentions and set up a meeting.

Sincerely,



David L. Wornson
Attorney, Iowa Department of Natural Resources
Tel. 515-242-5817, Fax 515-281-8895,
Email: david.wornson@dnr.state.ia.us

Copy: DNR
Encl. DNR letters to TXU and OPPD dated March 31, 2003, OPPD Response letter
Delaware Secretary of State records on Council Bluffs Gas Company

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OMAHA
DENVER

May 15, 2003

David L. Wornson, Esq.
Iowa Department of Natural Resources
Wallace State Office Building
Des Moines, IA 50319

RE: Former Manufactured Gas Plant ("MGP") Site at 7th Street between
10th and 11th Avenue, Council Bluffs, Iowa ("Council Bluffs MGP Site")

Dear Mr. Wornson:

This firm represents Omaha Public Power District ("OPPD") of Omaha, Nebraska. Your letter of March 31, 2003 requested a response by OPPD to assertions that OPPD may be liable for alleged environmental contamination at and from the Council Bluffs MGP Site. Your March 31st letter enclosed a July 15, 2002 letter authored by a lawyer representing Aquila, Inc. ("Aquila"), the current owner of a portion of the Council Bluffs MGP Site (hereinafter, the "Aquila Letter"). The Aquila Letter contains the assertion that: "From 1899 through 1928, the [Council Bluffs] MGP was operated by predecessors to the Omaha Public Power District. . . ." (Aquila Letter, p. 3). In my letter to you dated April 17, 2003, I acknowledged receipt of your March 31st letter and the Aquila Letter. I requested copies of the attachments referenced in the Aquila Letter and asked for additional time to submit a response. You provided the attachments with a letter dated May 6, 2003, and requested OPPD's response by the end of May. As explained in this letter, the enclosed OPPD documents establish that OPPD is not a corporate successor of Nebraska Power Company with respect to any properties in Iowa, east of the Missouri River, or any liabilities relating to such properties, including the alleged contamination at the Council Bluffs MGP Site.¹

Aquila apparently contends that in 1946 OPPD purchased the Nebraska Power Company and assumed its obligations. However, it is questionable whether Nebraska Power Company, let

¹ OPPD has, since its inception, owned and operated distribution and related assets in Carter Lake, Iowa, which is on the west side of the Missouri River adjacent to the City of Omaha.

alone any alleged corporate successor, ever had any liability with respect to the Council Bluffs MGP Site. First, it is apparent from the Aquila Letter and its attachments that Nebraska Power Company never owned or operated the Council Bluffs MGP Site. Rather, when Nebraska Power Company was incorporated in 1917, the Council Bluffs MGP Site was owned and operated by Citizens Gas & Electric Company ("CGE"). Aquila contends that CGE continued to own and operate the site from 1917 to 1928 as a *subsidiary* of Nebraska Power Company, but fails to explain how Nebraska Power Company, as the alleged parent, is liable for the activities of a separately incorporated entity which owned and operated the MGP Site. (Aquila Letter, p. 4). Indeed, it is not entirely clear from the attachments to the Aquila Letter when CGE allegedly became a subsidiary of Nebraska Power Company. Second, on June 1, 1928, CGE sold the Council Bluffs MGP Site to Council Bluffs Gas Company. (*Id.*) Aquila alleges that this 1928 sale was an "asset purchase" but I cannot fully respond to that assertion because I did not receive a copy of the agreement referenced as "Tab J" on page 4 of the Aquila Letter. In any event, Council Bluffs Gas Company took over an operating MGP, ran it until it was closed in 1932, and would bear full responsibility for the disposition of MGP equipment and structures and any residual or waste products generated from the MGP process and present on the site as of the time of closure.

According to Aquila, CGE was later renamed Citizens Power and Light Company ("Citizens Power") and was merged into the Nebraska Power Company as of June 1, 1937. (*Id.*) Aquila provides no information as to what obligations, if any, were assumed, or whether CGE/Citizens Power was dissolved as a corporate entity prior to or after the alleged merger. The only evidence submitted by Aquila on this point is a cryptic reference in a 1945 *Moody's Manual of Investments* (Tab K to the Aquila Letter) to CGE being "merged as of June 1, 1937." Even assuming, however, that this merger of a former subsidiary into its parent took place, it did not occur until nine years after the sale of the Council Bluffs MGP Site to Council Bluffs Gas Company. The Supreme Court of Iowa has declared that liability for environmental cleanup under Iowa Code § 455B.392 (1)(a) is limited to the contamination proven to be caused by the alleged liable party. Blue Chip Enterprises v. State of Iowa Department of Natural Resources, 528 NW2d 619, 623-24 (Iowa 1995). Even if it could be established by credible evidence that Nebraska Power Company assumed by merger the liabilities of CGE/Citizens Power with respect to the Council Bluffs MGP Site, there does not appear to be any proof as to the "extent of contamination", if any, caused by CGE/Citizens Power during its operation of the Council Bluffs MGP Site.

Regardless of the potential liability that may have accrued to Nebraska Power Company through the 1937 alleged merger discussed above, OPPD's corporate documents conclusively demonstrate that OPPD did not purchase any Iowa properties of Nebraska Power Company located east of the Missouri River and did not "succeed to" any potential liability of Nebraska Power Company with respect to such properties. Attachment 1 to this letter is a copy of minutes of a special meeting of the Board of Directors of Omaha Public Power District convened on September 5, 1946. Attached to the minutes are two versions of a stock purchase agreement between the Omaha Electric Committee, Inc., a Nebraska nonprofit corporation (the

"Committee") and OPPD. The second copy of the stock purchase agreement is designated as the final version and was entered into on October 19, 1946.

The stock purchase agreement states, in the first recital, that the Committee is the owner of all of the outstanding stock of Nebraska Power Company, which is thereafter referred to in the agreement as "the Company." The stock purchase agreement further states, in paragraph 1, as follows:

- "1. The Committee will organize a new Iowa Company and become the owner of all of its common stock, the only stock to be issued by it, and will transfer to the Iowa Company a portion of the common stock of the Company in exchange for bonds to be issued by the Iowa Company. Thereafter the Committee will vote, and will cause the Iowa Company to vote, for a partial liquidation of the Company to be accomplished by transfer to the Iowa Company of the Iowa properties now owned by the Company and certain other assets and cash existing as of the date of closing allocable to the Iowa properties as may be determined by R. W. Beck and Associates and Haskins & Sells, upon surrender by the Iowa Company of its stock in the Company."

Paragraph 2 of the October 19, 1946 stock purchase agreement states that the Committee would then sell to OPPD, on the closing date (which was December 2, 1946, as described in Attachment 3, *infra*), the remaining outstanding common stock of Nebraska Power Company. Thus, before OPPD purchased any stock of the Nebraska Power Company from the Omaha Electric Committee, the Committee first organized a new Iowa company to which the Committee transferred a portion of the common stock of Nebraska Power Company representing ownership of the Iowa properties.

Attachment 2 to this letter further explains the 1946 transaction relating to the Iowa properties of Nebraska Power Company. This document is the Official Statement of OPPD for a \$42,000,000 bond issue dated February 1, 1947 ("1947 Official Statement") and explains the status of the Omaha Electric Committee and the former Iowa properties of Nebraska Power Company. In 1946, when OPPD entered into the stock purchase agreement with the Omaha Electric Committee, Nebraska law did not authorize the ownership by a public power district of any substantial properties outside the state of Nebraska. This fact is explained in the second paragraph on page 8 of the 1947 Official Statement. That paragraph of the 1947 Official Statement further explains the manner of handling the Iowa portion of Nebraska Power Company's business, as follows:

"As part of a plan to achieve the complete liquidation of all properties formerly owned by the [Nebraska Power] Company, the [Omaha Electric] Committee organized Western Iowa Power Company (sometimes hereinafter referred to as "Western"), in which the Committee holds all the common stock, and caused the [Nebraska Power] Company to transfer all of said properties in

Iowa east of the Missouri River to Western. The Committee also holds, or will receive, debt obligations of Western, as the result of the liquidation of such Iowa properties of the [Nebraska Power] Company in exchange for 7.7% of the common stock of the [Nebraska Power] Company."

Thus, as shown in the 1947 Official Statement (Attachment 2), the stock of Nebraska Power Company relating to the Company's ownership of the Iowa properties (7.7% of the total) was not sold to OPPD in 1946, but, rather, was retained by the Omaha Electric Committee. Furthermore, at the time of the execution of the stock purchase agreement with OPPD in 1946, the Omaha Electric Committee agreed, in paragraph 5 of the stock purchase agreement (Attachment 1), that, pursuant to the Committee's charter, the Committee would "dispose of the securities" of the newly created Western Iowa Power Company and would "transfer the net proceeds and all other assets of the Committee" to OPPD, less "any liabilities of the Committee."

The "winding up" process described in paragraph 5 of the stock purchase agreement was completed by June 30, 1949. Attachment 3 to this letter is the Official Statement for a \$5,000,000 bond issue by OPPD on or about August 1, 1949 (the "1949 Official Statement"). The first paragraph of page 5 of the 1949 Official Statement summarizes the transactions relating to the Iowa properties of the Nebraska Power Company. That paragraph states that: "All of the securities of Western Iowa Power Company were held by Omaha Electric Committee Inc., until May 14, 1949, at which time they were sold to the Iowa Power & Light Company for \$3,430,000."² Following the sale to Iowa Power & Light Company, the Omaha Electric Committee paid over to OPPD all of its funds after payment of expenses, as it had agreed to do in the September 1946 stock purchase agreement.

The transactions relating to the Iowa properties of Nebraska Power Company are further described in the notes to OPPD's consolidated balance sheet as of June 30, 1949, on page 30 of the 1949 Official Statement (Attachment 3).

In summary, the enclosed OPPD documents demonstrate that Aquila's assertion that OPPD assumed the obligations of Nebraska Power Company with respect to the Iowa properties is simply false. OPPD did not acquire any stock of the Nebraska Power Company relating to that Company's ownership of the Iowa properties east of the Missouri River. That portion of Nebraska Power Company's stock was retained by the Omaha Electric Committee, which organized a separate Iowa company, Western Iowa Power Company, to hold the Iowa properties pending their sale. The Western Iowa Power Company's stocks, bonds, and the Iowa properties were sold on May 13, 1949 to Iowa Power & Light Company.

Accordingly, as explained in this letter and shown in the enclosed attachments, OPPD is not the successor by merger to Nebraska Power Company with respect to any properties in Iowa east of the Missouri River, including the Council Bluffs MGP Site sold by Nebraska Power Company's alleged subsidiary, CGE, to Council Bluffs Gas Company in 1928.

² Iowa Power & Light Company is now part of Mid American Energy Company.

David L. Wornson, Esq.


May 15, 2003

Page 5

We hope that this response adequately addresses the questions raised in your letter of March 31, 2003. OPPD would appreciate a written acknowledgement from the Department that it does not consider OPPD a potentially liable party with respect to the Council Bluffs MGP Site.

If you have any questions or you need any additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stephen M. Bruckner", with a long horizontal flourish extending to the right.

Stephen M. Bruckner
FOR THE FIRM

SMB/bjs

Enclosures

W322035

David L. Wornson, Esq.

May 15, 2003

Page 6

bcc: Bill Neal (*with attachments*)
Charles Moriarty (*with attachments*)



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May 15, 2003

FILE NO: 88332 - 000300

David L. Wornson, Esq.
Attorney
Iowa Department of Natural Resources
Wallace State Office Building
Des Moines, Iowa 50319

Re: Former MGP Plant, Council Bluffs, Iowa

Dear Mr. Wornson:

Thank you for speaking with me yesterday afternoon regarding the above-referenced MGP plant site. At the end of our telephone conversation, you requested that I write you a brief letter summarizing the main points of our discussion. This letter is in response to that request.

Following receipt of your letter to me of March 31, 2003, we have taken steps to determine what records, if any, still exist within the TXU organization regarding the Council Bluffs, Iowa MGP site, which was once owned by Council Bluffs Gas Company. It appears at this point that very little still exists. Indeed, TXU's main source of information regarding the MGP site at this point is the documentation that you enclosed along with your letter. That documentation consisted of July 15, 2002 and February 25, 2003 letters from Shook, Hardy & Bacon LLP, attorneys for Aquilla, and a portion of what appears to be an engineer's report on the MGP site.

Initially, I would note that Council Bluffs Gas Company acquired the MGP site in an asset purchase dated June 1, 1928 from Citizens Electric. Council Bluffs Gas Company later became a part of Lone Star Gas Company, which in turn was acquired by TXU. The documents that you sent me indicated that MGP operations at the site ceased in 1932. That being the case, it would certainly appear that, under the precedent of the Iowa Supreme Court in the *Blue Chip Enterprises* decision, my client's liability would, at most, be limited to contamination that occurred during those few years.

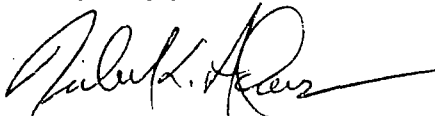
David L. Wornson, Esq.
May 15, 2003
Page 2

You indicated that a site assessment may be forthcoming in the relatively near future. Following that site assessment, you also said that you may desire to convene a meeting of parties who had some historical ownership interest in the MGP site to discuss a possible allocation of cleanup costs. If such a meeting comes about, please notify me so that TXU representatives may consider attending.

Please note that TXU has not conducted a detailed analysis at this time of any possible defenses, legal or factual, that it may have to cleanup liabilities at the MGP site. The purpose of my call to you yesterday was simply to provide our initial reactions to your letter and the materials that you were kind enough to include with the letter.

Please feel free to contact me should you have any questions.

Very truly yours,



Richard L. Adams



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

13 MAY 2003

Timothy Hall
Chief, Iowa Geological Survey and Land Quality Bureau
Iowa Department of Natural Resources
Wallace State Office Building
502 East 9th Street
Des Moines, IA 50319

Re: Letter dated March 26, 2003
Citizens Gas and Electric Company Site
Council Bluffs, Iowa
IAD 984569093

Dear Mr. Hall:

We have reviewed the referenced letter and it appears that contamination may exist at this site. Obviously, the site justifies the need for additional characterization to determine the extent of contamination and whether cleanup is necessary to address contamination above health-based levels of concern. The Environmental Protection Agency (EPA) can reopen a site whenever additional information becomes available indicating potential threats to human health or the environment.

At this time we understand that the Iowa Department of Natural Resources (IDNR) will continue to negotiate with Aquila and any other potentially responsible parties (PRPs) to obtain additional information on the site and perform the necessary response action. If the IDNR determines that the EPA should be the lead agency then we would request that a referral letter, to formally request new or change in the lead Agency be sent to EPA Region 7.

If we can be of any assistance in expediting the necessary steps to address contamination concerns and in making the subject lands available for reuse please call me at 913-551-7473. If I am not available please call Glenn Curtis at 913-551-7726 or Ken Rapplean at 913-551-7769.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth S. Buchholz".

Kenneth S. Buchholz
Chief

Enforcement/Fund-Lead Removal Branch
Superfund Division



STATE OF IOWA

THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
JEFFREY R. VONK, DIRECTOR

March 31, 2003

Fraser Stryker Law Firm
Attn. Steven Bruckner
500 Energy Plaza
409 S. 17th St.
Omaha, NE 68102

RE: Former Manufactured Gas Plant Site (MGP) and Omaha Public Power District (OPPD)
Located at 7th Street between 10th and 11th Ave., Council Bluffs, Iowa

Dear Mr. Bruckner:

Thank you for speaking with me on Tuesday, March 25, 2003 regarding this matter. As I explained the Iowa Department of Natural Resources (IDNR) is conducting some investigation into potential responsible parties associated with a MGP site in Council Bluffs, Iowa. One portion of the MGP site is currently owned by Aquila, Inc. who acquired it in 1985. An adjoining parcel is owned by a local contracting company, K.C. Peterson Construction Company who acquired it from Aquila, Inc. in 1986. I am enclosing some maps to give you some orientation to the property.

The purpose of this letter is to inform you of the regulatory status of this site and to provide an opportunity for Omaha Public Power District (OPPD) to review and respond to some factual and legal research conducted by counsel for Aquila which indicates OPPD could potentially have some responsibility for taking corrective action.

REGULATORY HISTORY

I will give you a very brief history regulatory history of the site. According to Aquila, Inc. (formerly UtiliCorp United Inc.), they purchased this property in 1985 as part of the purchase of Peoples Natural Gas Company (Peoples) assets which was then a division of HNG/InterNorth, Inc. which later changed its name to Enron Corp.¹ A "Phase I" investigation was apparently conducted in 1990 by Peoples that consisted of some soil and groundwater sampling which discovered elevated levels of PAHs and volatile hydrocarbons. In 1993, Peoples entered into an

¹ The research document from Aquila's counsel dated July 15, 2002 argues that Aquila has no successorship liability derived from Peoples since this property acquisition was only an asset purchase. However, Peoples signed an Administrative Consent Order in 1993 with EPA in which they state that Peoples is a division of UtiliCorp United, Inc.

Administrative Order On Consent (AOC) and agreed to conduct further site assessment in the form of a "Phase II" investigation. That Phase II report was submitted to EPA and is dated October 1995. At some point, I believe the AOC was terminated.

I believe some attention was then drawn to this site as the result of development plans by the City of Council Bluffs and the Pottawattamie County Development Corporation. They had also conducted a Phase II site assessment of properties in this area in March 2000. EPA Region 7 then made a decision to classify the site as "no further remedial action planned" (NFRAP) sometime in May 2000. Based on file material and conversations with EPA representatives and IDNR staff, part of the reason for EPA issuing the no further action status was the expectation that the IDNR would assume regulatory oversight and that the then "potentially responsible party" (PRP) had expressed an interest in undertaking some further corrective action. Apparently, the site did not score high enough for placement on the national priorities list (NPL).

The IDNR believes that further site assessment needs to be done at the site. The scope of that assessment has not yet been defined. There is also the possibility that some type of "removal" action may be required given the presence of old gasholders which are believed to contain source materials. There is also DNAPL or free product in groundwater. There may be some possibility that further remedial action might be required depending on the results of a risk assessment and the planned development activities.

OWNERSHIP AND OPERATIONAL HISTORY

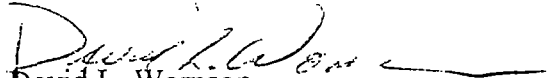
The IDNR asked Aquila, Inc. to provide what ownership and operational history they could for this site and to respond to the issue of whether they could be considered to have some environmental liability as a current property owner. They were also asked their position as to potential derivative or successorship liability arising out of affiliation with former owners and operators of the MGP. Aquila, Inc; through their counsel provided quite an extensive factual history of the property ownership, operational history and corporate affiliations with prior owners and operators.

That research draws the conclusion that OPPD may have some successorship liability due to its apparent acquisition of all the outstanding stock in Nebraska Power Company in 1945. Nebraska Power Company may have been the successor to Omaha Electric Light & Power Company which was a parent company of Citizens Gas & Electric Company of Council Bluffs (Citizens). Citizens in turn was both a former property owner and operator of the MGP from approximately 1903 until about 1928 when the property was sold to Council Bluffs Gas Company which owned and operated the facility until about 1932. Reportedly, the manufactured gas facilities remained operational in some limited fashion until about 1952. (See "Gas Plant History" from Phase II report which I have enclosed)

I am enclosing a copy of a document dated July 15, 2002 prepared by counsel for Aquila, Inc. and a follow-up research document dated February 25, 2003. The research references numerous source materials which I have available and can provide to you if necessary.

The IDNR is requesting that OPPD respond to the factual statements referenced in these documents as they apply to OPPD and provide your position on any potential liability OPPD might have under State and Federal law. I would greatly appreciate it if you could provide your response within 30 days. Any other comments, facts or legal analysis regarding other potentially responsible parties would be appreciated.

Sincerely,



David L. Wornson

Attorney, Iowa Department of Natural Resources
Tel. 515-242-5817, Fax 515-281-8895,
Email: david.wornson@dnr.state.ia.us

Copy:

Encl. Attorney Jane Schilmoeller letters, July 15, 2002, February 25, 2003, Site Map



THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

STATE OF IOWA

DEPARTMENT OF NATURAL RESOURCES
JEFFREY R. VONK, DIRECTOR

March 31, 2003

Hunton & Williams
Attn. Richard Williams *Adams*
1601 Bryan St., 30th Floor
Dallas, TX 75201

RE: Former Manufactured Gas Plant Site (MGP)
Located at 7th Street between 10th and 11th Ave., Council Bluffs, Iowa

Dear Mr. Williams:

Thank you for speaking with me on Thursday, March 27, 2003 regarding this matter. As I explained, the Iowa Department of Natural Resources (DNR) is conducting some investigation into potential responsible parties associated with a MGP site in Council Bluffs, Iowa. One portion of the MGP site is currently owned by Aquila, Inc. An adjoining parcel is owned by a local contracting company, K.C. Peterson Construction Company who acquired it from Aquila, Inc. I am enclosing some maps to give you some orientation to the property.

The purpose of this letter is to inform you of the regulatory status of this site and to provide an opportunity for TXU, Inc. to review and respond to some factual and legal research conducted by counsel for Aquila which indicates TXU, Inc. could potentially have some affiliation with a company called Lone Star Gas Company which may have acquired stock ownership of a former owner and operator of the MGP, Council Bluffs Gas, Co.

REGULATORY HISTORY

I will give you a very brief history regulatory history of the site. According to Aquila, Inc. (formerly UtiliCorp United Inc.), they purchased this property in 1985 as part of the purchase of Peoples Natural Gas Company (Peoples) assets which was then a division of HNG/InterNorth, Inc. which later changed its name to Enron Corp.¹ A "Phase I" investigation was apparently conducted in 1990 by Peoples that consisted of some soil and groundwater sampling which discovered elevated levels of PAHs and volatile hydrocarbons. In 1993, Peoples, identified as a division of UtiliCorp United, Inc., entered into an Administrative Order On Consent (AOC) with

¹ The research document from Aquila's counsel dated July 15, 2002 argues that Aquila has no successorship liability derived from People's since this property acquisition was only an asset purchase. However, Peoples signed an Administrative Consent Order in 1993 with EPA in which they state that Peoples is a division of UtiliCorp United, Inc.

EPA Region 7 and agreed to conduct further site assessment in the form of a "Phase II" investigation. That Phase II report was submitted to EPA and is dated October 1995. At some point, I believe the AOC was terminated.

I believe some attention was then drawn to this site as the result of development plans by the City of Council Bluffs and the Pottawattamie County Development Corporation. They had also conducted a Phase II site assessment of properties in this area in March 2000. EPA Region 7 then made a decision to classify the site as "no further remedial action planned" (NFRAP) sometime in May 2000. Based on file material and conversations with EPA representatives and IDNR staff, part of the reason for EPA issuing the no further action status was the expectation that the DNR would assume regulatory oversight and that the then "potentially responsible party" (PRP), UtiliCorp United, Corp. had expressed a willingness to undertake some further corrective action. Apparently, the site did not score high enough for placement on the national priorities list (NPL).

The IDNR believes further site assessment needs to be done at the site. The scope of that assessment has not yet been defined. There is also the possibility that some type of "removal" action may be required given the presence of old gasholders which are believed to contain waste materials. There is also DNAPL or free product in groundwater. There may be some possibility further remedial action might be required depending on the results of a risk assessment and the planned development activities.

OWNERSHIP AND OPERATIONAL HISTORY

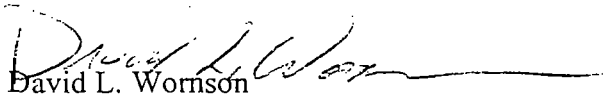
The DNR asked Aquila, Inc. to provide what ownership and operational history they could for this site and to respond to the issue of whether they could be considered to have some environmental liability as a current property owner. They were also asked their position as to potential derivative or successorship liability arising out of affiliation with former owners and operators of the MGP. Aquila, Inc; through their counsel provided quite an extensive factual history of the property ownership, operational history and corporate affiliations with prior owners and operators.

That research indicates that a company called Council Bluffs Gas Company purchased the site in 1928 and operated the MGP at least until 1932. Reportedly, the manufactured gas facilities remained operational in some limited fashion until about 1952 during which time property records continue to show Council Bluffs Gas Company as the owner. (See "Gas Plant History" from Phase II report which I have enclosed) There is some rather ambiguous references from a Moody's Public Utility Manual that suggests that a company called Lone Star Gas Company may have acquired ownership of Council Bluffs Gas Company through a stock acquisition in 1929. However, there is also a reference to a divestiture by Lone Star Gas Company (the reference material seems to confused Lone Star Gas Corporation and Lone Star Gas Company) of ownership in Council Bluffs Gas Company to some "small investors" in 1942. It does appear from county property records that Council Bluffs Gas Company continued as a viable entity to at least 1960 since property ownership of some of the parcels was transferred to Northern Natural Gas Company in 1960.

I am enclosing a copy of a document dated July 15, 2002 prepared by counsel for Aquila, Inc. and a follow-up research document dated February 25, 2003. The research references numerous source materials which I have available and can provide to you if necessary. I am including the referenced material about Lone Star Gas Company from Moody's

The IDNR is requesting that TXU, Inc. respond to the factual statements referenced in these documents as they apply to Council Bluffs Gas Company, Lone Star Gas Company and TXU, inc. and provide your position on any potential liability under State and Federal law. I would greatly appreciate it if you could provide your response within 30 days. Any other comments, facts or legal analysis regarding other potentially responsible parties would be appreciated.

Sincerely,



David L. Wornson
Attorney, Iowa Department of Natural Resources
Tel. 515-242-5817, Fax 515-281-8895,
Email: david.wornson@dnr.state.ia.us

Copy: DNR

Encl. Attorney Jane Schilmoeller letters, July 15, 2002, February 25, 2003, Site Map, Summary of Property ownership, Summary from Phase II report



D.W.

STATE OF IOWA

THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
JEFFREY R. VONK, DIRECTOR

March 26, 03
August 8, 2002

Mr. Glenn Curtis
Superfund Division
United States Environmental Protection Agency
901 N. Fifth Street
Kansas City, KS 66101

Mr. Ken Buchholz
Superfund Division
United States Environmental Protection Agency
901 East Fifth Street
Kansas City, KS 66101

SUBJECT: Citizens Gas and Electric Company Site, Council Bluffs, Iowa
IAD 984569093

Dear Mr. Curtis and Mr. Buchholz:

The Citizens Gas and Electric Company site was assessed by Peoples Natural Gas Company (Peoples) in the early and mid 1990s under EPA Region 7's Superfund Division Remedial Branch oversight. After assessment was completed, the site was scored utilizing the Hazard Ranking System (HRS), at which time it did not score sufficiently for NPL listing and was apparently given no further remedial action planned (NFRAP) status. There is some indication this classification was made with the expectation that there would be further voluntary action by Peoples with State oversight.

In the last couple of years, the Iowa Department of Natural Resources has gathered the following new information which indicates that conditions have changed at this site, after it was classified as NFRAP:

1. In July 1990, the Council Bluffs Area Chamber of Commerce notified the IDNR that they were targeting an area referred to as the "South Main Urban Renewal Area", which included the above site (shown in Attachment 3 to Council Bluff's Brownfields Assessment Demonstration Pilot Project Grant Application, dated December 10, 2001). Although specific plans have not been developed for the MGP property itself, the City's plan for the overall area is "significant industrial activity, public facilities, recreational opportunities, and commercial activity". This indicates a change in land use may occur in the future for this site, which is currently industrial and commercial.

2. Based upon the results of a 2000 Phase II property assessment by Pottawattamie County Development Corporation, significant coal tar contamination was noted on industrial property located east and adjacent to the site (naphthalene was detected at 6,160 ug/L in a groundwater sample). This property is located within the "South Main Urban Renewal Area" and is targeted for redevelopment by the City as "Mixed Use" and "Neighborhood Commercial".
3. Both of the above indicate the possibility for significant change in land use for the MGP and adjacent properties, along with an increased potential for worker and resident exposure to the gas plant wastes and residual gas plant contamination which remains on the site.
4. In 2002, the IDNR was notified by the City of Council Bluffs that they were planning to install sewer and water lines down South 7th Street, including Right-of-Way (ROW), which bisects the properties that formerly housed the gas plant. The city has put this project on hold pending resolution of MGP contamination liability issues. The Department is concerned that installation of the proposed utilities in the City ROW may breach old gas plant line(s) that have been verified to exist underneath the street, causing a significant release from the pipe and the gas plant structures to which it may be attached. Since this pipe is MGP-related, we are concerned that it contains coal tar or petroleum compounds. The DNR is also concerned for the health and safety of any contractor who may come into contact with these materials.
5. Aquila (formerly Utilicorp United) has verified residual PAH contamination in the City ROW from a series of geoprobe holes they installed in the ROW in 2002. The Department is concerned that this residual contamination may pose a health threat to contractors working in the sewer/water line project.
6. In June 2002, the Department received word from the City of Council Bluffs that Aquila personnel developed headaches and got sick due to something they encountered while relocating an active gas line near the MGP on 7th Street. The material they encountered had a strong moth ball odor, according to the City Engineer, which is commonly indicative of the presence of coal tar wastes. Aquila confirmed that three of their workers became ill after exposure to something in the excavation and that they reported the incident to the Council Bluffs Public Health Department. Aquila did not report the incident to the IDNR and refused to complete DNR's incident report after we became aware of the situation.

In addition, the Department is concerned about the quantity of waste materials probably remaining on site in tanks. It was estimated in the site investigation report for the site that approximately 7,000 cubic yards of source material remains buried in the known gas holder bases. We are also concerned that the extent of nonaqueous phase product at the site (light and dense) has not been fully defined.

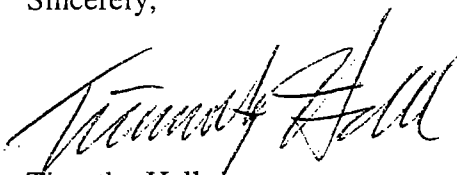
There is also a possibility that the integrity of the gas holders may have been compromised by a boring installed in 1989 by Geotechnical Services, Inc. (ST-5, installed in gas holder #2) and by a boring and bridge pilings installed by Iowa Department of Transportation in the late 1960s and early 1970s. Because of this, and our experience with manufactured gas plants in general, we are concerned that product may be leaking from these gas holders (and other buried tanks likely present onsite) and will continue to do so until the tanks' contents are removed.

Based on this information on our concerns, the Department has taken steps to identify and contact Potentially Responsible Parties (PRPs) while determining liabilities according to state law. Iowa environmental liability law is not as broad as to current property owners as under CERCLA, and Aquila is raising this issue to any state claims requiring cleanup. *See Blue Chip Enterprises, Inc. et al v. IDNR, 528 NW2nd 619, (Iowa 1995).* The Department is also trying to identify whether this site would be a candidate for removal of the NFRAP classification by EPA Region 7, based upon the new information gathered. We do not expect that the site could be reopened for consideration under the Remedial Branch of the Superfund Division, but believe that it could be a candidate for a possible Removal Site Assessment under the Removal Branch.

The Department is still in process of identifying PRPs and negotiating with Aquila as to further corrective action. We are not asking EPA to reopen the site at this time, but are asking your opinion on whether this site might qualify for reopening in the event the Department is not able to negotiate or enforce required corrective action, including removal, with Aquila and other PRPs. The Department needs to be able to credibly convey the possibility that referral to EPA is an option.

If you have any questions regarding the contents of this letter, please feel free to call me at (515) 281-8169.

Sincerely,



Timothy Hall
Bureau Chief



STATE OF IOWA

THOMAS J. VILSACK, GOVERNOR
SALLY J. PEDERSON, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
JEFFREY R. VONK, DIRECTOR

September 15, 2003

Jane Schilmoeller
Shook, Hardy & Bacon, LLC
84 Corporate Woods
10901 Mastin, Suite 1000
Overland Park, KS 66210-1671

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Energy Plaza 30th Floor
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Dallas, Texas 75201-3402

IDOT
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800 Lincoln Way,
Ames, IA 50010

Pottawattamie County Development
Matt Buchanan
7 North 6th St.
P.O. Box 1565
Council Bluffs, IA 51503

City of Council Bluffs
attn: Ed Jankowski
209 Pearl Street
Council Bluffs, IA 51503

RE: Council Bluffs Former Manufactured Gas Plant Site
7th Street between 10th and 11th Ave., Council Bluffs, Iowa

Dear Parties:

As you know, the Iowa Department of Natural Resources is currently the lead agency providing regulatory oversight of this former MGP site in Council Bluffs. For some time the DNR has been researching and communicating with potentially responsible parties (PRPS) to initiate some further site investigation and possibly other remedial action.

The Department has been primarily communicating with Aquila, Inc. who is the current property owner of most of the affected area. We have tentatively scheduled a meeting at the DNR office, Wallace State Office Building, in Des Moines, Iowa for Wednesday, October 8, 2003 at 10:00 AM. The Department has also had correspondence with TXU, Inc. through their counsel, Richard Adams, with Hunton & Williams, and Omaha Public Power District (OPPD) through their counsel, Stephen Bruckner with Fraser Law Firm. The Department has also communicated with the Iowa Department of Transportation (IDOT) regarding their historical involvement.

The purpose of this meeting is to discuss the data that is available to date and discuss the scope of the site assessment which the DNR is expecting to be done and the expected development future in this area. The DNR will outline the regulatory oversight options such as enrollment in the Iowa Land Recycling Program, entering into a consent order or some more informal process.

We would also like to provide an opportunity for the PRPS and the DNR to discuss liability and allocation of liability issues and options for planning remedial action.

Aquila has indicated they will attend the meeting and they have expressed a willingness to cooperate in initiating a site assessment plan depending on its scope. The DNR has not dismissed TXU, Inc. or OPPD as PRPS, and we would invite them to attend the meeting if at all possible.

The DNR project manager is Mick Leat who can be reached at 515-281-8045. Please advise whether you intend to participate in this meeting by contacting myself or Mr. Leat.

Sincerely,

A handwritten signature in black ink, appearing to read 'David L. Wornson', with a long horizontal flourish extending to the right.

David L. Wornson

Attorney, Iowa Department of Natural Resources

Tel. 515-242-5817, Fax 515-281-8895, Email: david.wornson@dnr.state.ia.us

Copy: M. Leat, Cal Lundberg, DNR

LAW OFFICES

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TELEPHONE (913) 451-6060 • FACSIMILE (913) 451-8879

NEW ORLEANS
OVERLAND PARK
SAN FRANCISCO
TAMPA
WASHINGTON, D.C.

July 15, 2002

VIA FACSIMILE & REGULAR MAIL

David L. Wornson, Esq.
Attorney, Iowa Department of Natural Resources
502 East 9th Street
Des Moines, Iowa 50319

Re: Council Bluffs Former Manufactured Gas Plant (FMGP)

Dear Mr. Wornson:

On behalf of Aquila, Inc. ("Aquila"), formerly known as UtiliCorp United Inc., this responds to your letter of April 24, 2002. Thank you for your consideration in extending the time for this response to July 15, 2002. UtiliCorp United Inc. changed its name to Aquila on March 18, 2002.

The Department specifically requested that Aquila provide a description of the ownership and corporate history with respect to this site. In your letter of April 24, 2002, you state that, "[b]ased on some preliminary research of corporation history, Aquila, Inc. appears to be the successor to the Peoples Natural Gas Company, Northern Natural Gas Company and Council Bluffs Gas Company all of which owned and operated the FMGP." This is not correct.

On September 13, 1985, Aquila purchased the assets of the Peoples Natural Gas division of HNG/InterNorth, Inc. HNG/InterNorth, Inc. changed its name to Enron Corp. on April 10, 1986. A copy of the relevant portions of the 1985 Asset Purchase Agreement is enclosed. (Tab A). Aquila purchased only certain assets of a corporation that continued in existence for many years following the purchase. It is well settled that a corporation that purchases the assets of another corporation assumes no liability for the transferring corporation's debts and liabilities, unless specific language in the agreement or an established exception to the general rule applies. *See, e.g., Pancratz v. Monsanto Co.*, 547 N.W.2d 198, 200 (Iowa 1996).

The specific language of the 1985 Asset Purchase Agreement excludes MGP-related liabilities from the specific liabilities assumed by Aquila. The Specified Liabilities that Aquila agreed to assume under the terms of the 1985 Asset Purchase Agreement are set out in Schedule M of the Agreement. The Specified Liabilities do not include MGP liabilities.

In addition, the Agreement included certain indemnity obligations, and the parties executed an Assumption Agreement. *See* § 4.6(b) (Indemnification by Buyer) and Exhibit 6 (Form of Buyer's Assumption Agreement) (Tab A). In both the Indemnification and the Assumption Agreement Aquila agreed only to indemnify the Seller (Enron) for "liabilities or obligations with respect to all lawsuits, claims, demands, actions or suits, losses, costs or damages *that are not recorded as liabilities on Seller's accounting books and records at Closing*"

MGP-related liabilities were included as liabilities in Enron's records as of the time of the closing of the 1985 transaction, as evidenced by Schedule J to the 1985 Asset Purchase Agreement. Schedule J lists litigation and other liabilities and specifically includes "Manufactured Gas Plant Sites." As "Manufactured Gas Plant Sites" were included in Enron's records at Closing as a liability, the indemnification and Assumption Agreement do not apply to those liabilities.

Therefore, Aquila disagrees with the Department's statements that it is a "successor" to Peoples Natural Gas Company, a division of InterNorth, Northern Natural Gas Company, and Council Bluffs Gas Company; that it is a "primary responsible party" for conducting further remedial response; or that it is a successor to an actual "operator" of the Council Bluffs FMGP. Neither Aquila nor any of its predecessors, operated the Council Bluffs MGP or caused the existence of a hazardous condition at the site.

Pursuant to Iowa Statute Section 455B.392, a party is only liable to the state or any other person for cleanup costs that are incurred "as a result of the failure of the person to clean up a hazardous substance involved in a hazardous condition *caused by that person.*" (emphasis added) The Iowa Supreme Court has held that, in light of this language, any order by the Department "requiring implementation of a remedial action plan to abate or eliminate the soil or groundwater contamination must be limited to the extent of contamination caused by each" party. *Blue Chip Enterprises v. Iowa Dep't of Nat. Res.*, 528 N.W.2d 619, 624 (Iowa 1995).

In addition to requesting further "remedial response," the Department in its April 24, 2002 letter mentions further site investigation. As the current owner of a portion of the former MGP property, Aquila will work cooperatively with the Department and looks forward to further discussions. However, Aquila already has performed extensive investigation and characterization of the site under an Administrative Order on Consent

dated September 30, 1993 with EPA Region VII. Therefore, Aquila questions whether additional investigation and characterization of the site is necessary or helpful for the ultimately responsible parties to prepare a response.

If there is additional investigation or characterization that the Department would like to perform, in light of the fact that Aquila has no liability for ultimate cleanup costs because it never operated the MGP, Aquila urges the Department to involve the parties primarily responsible at this stage. To aid the Department, Aquila provides below its research regarding the operational and corporate history of the Council Bluffs FMGP.

On October 10, 1889, the property was sold by George F. Wright to the Council Bluffs Gas Light Company. *See October 10, 1889 Warranty Deed from George F. Wright and wife Ellen E. and Joel Eaton, unmarried to The Council Bluffs Gas & Electric Light Company* (Tab B). On October 10, 1889, the MGP property was transferred to the Council Bluffs Gas & Electric Light Company. *See October 10, 1889 Warranty Deed from George F. Wright and wife Ellen E. and Joel Eaton, unmarried to The Council Bluffs Gas & Electric Light Company* (Tab B). The Council Bluffs Gas & Electric Light Company was liquidated in bankruptcy in 1898, and the property was transferred in that year by the Master Commissioner to Frank T. True. *See December 17, 1898 Master's Deed from Lewis W. Ross, Master Commissioner to Frank T. True* (Tab C). On January 4, 1899, Frank and Anna True deeded the property to Council Bluffs Gas & Electric Company. *See January 4, 1899 Special Warranty Deed from Frank T. True and wife Anna C. to The Council Bluffs Gas & Electric Company* (Tab D).

From 1899 through 1928, the MGP was operated by predecessors to the Omaha Public Power District ("OPPD"). On November 13, 1900, the Citizens Gas & Electric Company was incorporated in New Jersey. *See Moody's Public Utility Manual* (hereinafter "*Moody's*"), 1922 (Tab E). On December 24, 1900, the Council Bluffs Gas & Electric Company leased the MGP property to Citizens Gas & Electric Company of Council Bluffs for a period of 99 years. *See December 24, 1900 lease from Council Bluffs Gas & Electric Company to Citizens Gas & Electric Company, Council Bluffs* (Tab F).

In 1903, the Omaha Electric Light & Power Company acquired control of both Citizens Gas & Electric Company of Council Bluffs and of New Omaha, Thomson-Houston Electric Light Company. *See Moody's, 1914* (Tab G); *See also* Omaha Public Power District's web site at www.oppd.com/whoweare/earlyyrs.htm. On January 15, 1904, Council Bluffs Gas & Electric Company deeded the MGP property to Citizens Gas & Electric Company of Council Bluffs. *See January 15, 1904 Deed from Council Bluffs Gas & Electric Company to Citizens Gas and Electric Company* (Tab H). At that same time, the Council Bluffs Gas & Electric Company was merged into Citizens Gas & Electric Company of Council Bluffs. *See Moody's, 1922* (Tab E).

On April 23, 1917, the Nebraska Power Company was incorporated as the successor to the Omaha Electric Light & Power Company, the parent company of Citizens Gas & Electric Company of Council Bluffs. *See Moody's, 1918* (Tab I). The Nebraska Power Company continued to operate Citizens Gas & Electric Company of Council Bluffs as its subsidiary.

On June 1, 1928, the Citizens Gas & Electric Company sold the MGP property to Council Bluffs Gas Company. This was an asset purchase that did not provide for the assumption of any liabilities by the purchaser, Council Bluffs Gas Company. *See June 1, 1928 Agreement between Citizens Gas & Electric Company of Council Bluffs and Council Bluffs Gas Company* (Tab J). Subsequent to that sale, the Citizens Gas & Electric Company changed its name to Citizens Power & Light Company. *See Moody's, 1945* (Tab K). On June 1, 1937, the Citizens Power & Light Company was merged into the Nebraska Power Company. *See Moody's, 1945* (Tab K).

On December 26, 1944, the Omaha Electric Committee, Inc. purchased all of the outstanding stock of the Nebraska Power Company. In 1945, the OPPD was formed, and in 1946 the OPPD purchased the Nebraska Power Company from the Omaha Electric Committee. *See Omaha Public Power District v. O'Malley*, 216 F.2d 764, 767 (8th Cir. 1954). In that transaction, OPPD "assumed and agreed to pay all of the obligations of the Nebraska Power Company." *Id.*

From 1928 through 1932, when MGP operations ceased, the plant was operated by the Council Bluffs Gas Company. During this period of time, the Council Bluffs Gas Company initially was controlled by Union Utilities Inc. *See Moody's, 1929* (Tab L). On October 1, 1929, all of the stock of the Council Bluffs Gas Company was transferred to Lone Star Gas Corporation. *See Moody's, 1944* (Tab M). Lone Star Gas Company was incorporated on December 11, 1942, as the successor to Lone Star Gas Corporation. *See Moody's, 1944* (Tab M). Lone Star Gas Company changed its name to ENSERCH Corporation on October 10, 1975. In 1997, ENSERCH Corporation merged with Texas Utilities, which changed its name to TXU Corp. in 1999. *See* www.txucorp.com/about/history.com.

In addition to the owners and operators described above, two other potentially responsible parties exist. First, at the time that Nebraska Power Company was incorporated in 1917 to be the successor to Omaha Electric Light & Power, Nebraska Power Company was owned and controlled by American Power & Light Company. *Moody's, 1928* (Tab N). American Power & Light Company was a subholding company subsidiary of Electric Bond & Share Company. *See American Power and Light Co. v. Securities and Exchange Comm'n*, 141 F.2d 606 (1st Cir. 1944). The court in this case found that "it is clear and undisputed that Bond & Share controls American . . . ; and that such control pervades the whole of these subholding company systems in a most

comprehensive manner. *Id.* at 615. American Power & Light Company was dissolved in 1946. In 1968, Electric Bond & Share Company changed its name to Ebasco Industries, Inc. In 1969, Ebasco Industries was merged into Boise Cascade Corporation.

Also, in the late 1960s the Iowa Department of Transportation ("IDOT") obtained a right of way through the site for construction of Highway 192. In the early 1970s, during the construction of the highway, it appears that IDOT may have punctured an underground gasholder. (Tab O).

As mentioned, Aquila looks forward to future discussion and encourages the Department to involve the parties responsible for MGP operations at this stage.

Please feel free to contact me with any questions.

Very truly yours,

A handwritten signature in cursive script, reading "Jane E. Schilmoeller".

Jane E. Schilmoeller

JES:pjh
Enclosures (via regular mail)

cc: Michael Leat
Ivan Vancas
Tracy Peterson
Gene Russell
Bob Beck
Ed Clement